Sheno Paper Industries Sdn Bhd v Pacidunia Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO D2-24-249 OF 1999
ABDUL AZIZ J
30 NOVEMBER 1999

Companies and Corporations *— Debenture — Sale by debenture of charged land — Sale executed by receiver and manager — Whether receiver and manager entitled to sell charged land without taking proceedings under the National Land Code 1965 to obtain a judicial sale — Whether Federal Court decision in Kimlin Housing Development applies*

Companies and Corporations *— Receivership — Powers of receivers and managers to sell property — Sale by debenture of charged land — Sale executed by receiver and manager — Whether receiver and manager entitled to sell charged land without taking proceedings under the National Land Code 1965 to obtain a judicial sale — Whether Federal Court decision in Kimlin Housing Development applies*

As security for banking facilities granted by Bank of Commerce (M) Bhd ('BOC') to Sheno Paper Industries Sdn Bhd ('Sheno'), Sheno charged their lands to BOC under the National Land Code 1965 ('the Code') and also executed a debenture in favour of BOC by which Sheno contractually charged all their assets and undertakings in favour of BOC. The debenture provided that in the event of Sheno's defaulting under the facilities agreement, BOC were empowered, inter alia, to appoint a receiver and manager of Sheno's assets and undertaking and that one of the powers of the receiver and manager, who shall be Sheno's agent, was to sell the assets comprised in the security and to carry such sale into effect by conveying or executing the same for or on behalf of Sheno. Sheno defaulted under the facilities and BOC appointed a receiver and manager of all Sheno's assets and undertakings. The receiver and manager, by virtue of his power under the debenture, entered into a sale and purchase agreement to sell the lands to Pacidunia Sdn Bhd. He signed the agreement as signing for Sheno, described as the vendor. The sale and purchase agreement proclaimed itself to be an agreement between Sheno and Pacidunia. The sale and purchase agreement provided that the agreement was conditional upon Sheno's obtaining a court declaration that the receiver and manager was empowered to sell the land. In his affidavit, the receiver and manager said that the reason for the need to obtain such a court declaration was that, in view of the Federal Court decision in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, there was uncertainty as to his power to execute the sale and purchase agreement on behalf of Sheno. It was argued that the Federal Court in *Kimlin* made references to the conferring by the debenture of the power of sale on the 'chargee himself' and from that the question that the Federal Court was concerned with was the question of the power of sale of the chargee,

which had nothing to do with the power of sale of the receivers and managers.

Held, dismissing the application:

The principle in *Kimlin* was applicable to the present case. In *Kimlin*, the Federal Court in saying that no power of sale could be conferred by way of a debenture by a chargor on a chargee, used the emphatic 'himself' in reference to the chargee. Any suggestion that the emphasis means that a power of sale may therefore be conferred on a receiver and manager will straight away be demolished by the ultimate answer of the Federal Court which was directed to the power of sale conferred by the debenture on receivers and managers. As to why the word 'himself' was used, looking at the passage as a whole, it was to emphasize that the power of sale that was conferred on the chargee was a power for the chargee to carry out the sale 'in his own way' instead of as a sale conducted under the supervision of the court under the Code. Therefore, the receiver and manager in the present case was not entitled to sell the charged lands without taking proceedings under the Code to obtain a judicial sale (see p 353B–F).

[Bahasa Malaysia summary

Sebagai jaminan untuk kemudahan perbankan yang diberikan oleh Bank of Commerce (M) Bhd ('BOC') kepada Sheno Paper Industries Sdn Bhd ('Sheno'), Sheno telah gadaikan tanah-tanah mereka kepada BOC di bawah Kanun Tanah Negara 1965 dan juga melaksanakan debentur yang berpihak kepada BOC di mana Sheno secara kontrak telah menggadaikan semua aset dan gerenti yang berpihak kepada BOC. Debentur tersebut memperuntukkan bahawa di dalam keadaan di mana Sheno ingkar di bawah perjanjian kemudahan tersebut, BOC diberikan kuasa, antara lain, untuk melantik penerima dan pengurus aset-aset dan gerenti Sheno dan bahawa salah satu kuasa penerima dan pengurus, yang akan menjadi ejen Sheno, adalah untuk menjual aset-aset yang termasuk di dalam jaminan tersebut dan untuk memberi kesan kepada jualan sedemikian dengan menguruskan aset-aset tersebut untuk atau bagi pihak Sheno. Sheno telah ingkar di bawah kemudahan tersebut dan BOC telah melantik penerima dan pengurus untuk semua aset-aset dan jaminan-jaminan Sheno. Penerima dan pengurus tersebut, menurut kuasanya di bawah debentur, telah memasuki suatu perjanjian jual beli untuk menjual tanah-tanah tersebut kepada Pacidunia Sdn Bhd. Beliau telah menandatangani perjanjian tersebut bagi Sheno, yang digambarkan sebagai penjual. Perjanjian jual beli itu sendiri menyatakan bahawa ia adalah perjanjian antara Sheno dan Pacidunia. Perjanjian jual beli memperuntukkan bahawa perjanjian tersebut adalah dengan syarat Sheno mendapatkan perintah perisytiharaan daripada mahkamah bahawa penerima dan pengurus telah diberi kuasa untuk menjual tanah tersebut. Di dalam afidavitnya, penerima dan pengurus tersebut

mengatakan bahawa sebab untuk keperluan mendapatkan suatu perisytiharaan mahkamah adalah memandangkan keputusan Mahkamah Persekutuan di dalam *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, terdapat ketidaktentuan berkenaan kuasa untuk melaksana perjanjian jual beli bagi pihak Sheno. Adalah dihujahkan bahawa Mahkamah Persekutuan di dalam *Kimlin* telah membuat rujukan kepada pemberian kuasa oleh debentur berkenaan dengan kuasa jualan 'pemegang gadaian itu sendiri' dan dari situ persoalan yang Mahkamah Persekutuan pertimbangkan adalah persoalan kuasa menjual pemegang gadaian, yang tiada kaitan dengan kuasa menjual penerima-penerima dan pengurus-pengurus.

Diputuskan, menolak permohonan tersebut:

Prinsip di dalam *Kimlin* boleh terpakai di dalam kes ini. Di dalam *Kimlin*, Mahkamah Persekutuan di dalam mengatakan bahawa tiada kuasa menjual boleh diberikan melalui debentur oleh seorang penggadai ke atas pemegang gadaian, telah menggunakan 'beliau' di dalam merujuk kepada pemegang gadaian. Apa-apa cadangan bahawa penekanan tersebut bermaksud kuasa untuk menjual mungkin boleh diberikan ke atas penerima dan pengurus akan terus dihapuskan oleh jawapan muktamad Mahkamah Persekutun yang ditujukan kepada kuasa untuk menjual yang diberikan oleh debentur ke atas penerima dan pengurus. Sebab mengapa perkataan 'beliau' digunakan, dengan membaca keputusan secara menyeluruh, ia adalah untuk menekankan bahawa kuasa untuk menjual yang diberikan ke atas pemegang gadaian adalah kuasa untuk pemegang gadaian untuk menjalankan jualan 'di dalam caranya sendiri' berbanding dengan jualan yang dijalankan di bawah penyeliaan mahkamah di bawah Kanun tersebut. Oleh itu, penerima dan pengurus di dalam kes ini adalah tidak berhak untuk menjual tanah yang digadaikan tanpa mengambil prosiding-prosiding di bawah Kanun untuk menperolehi suatu jualan kehakiman (lihat ms 353B–F).]

Notes

For cases on debenture generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 69–76.

For a case on powers of receivers and managers to sell property, see 3 Mallal's Digest (4th Ed, 1997 Reissue) para 396.

Cases referred to

Bank Bumiputra Malaysia Bhd & Ors v Kimlin Housing Development Sdn Bhd (in receivership) [1993] 2 MLJ 126 (refd)

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)

A *United Malayan Banking Corp Bhd v Official Assignee and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor* [1986] 1 MLJ 75 (refd)

Legislation referred to

B Companies Act 1965 ss 4(1), 183(3)
National Land Code 1965

N Nadkarni (with *S Yogeswaran*) (*Lee Hishammuddin*) for the plaintiffs.
Adi Azhar bin Abdul Majid (*Yusuf Abdul Rahman & Co*) for the first defendant.
C *Benjamin Dawson* (*Nik Hussain & Partners*) for the second defendant.

Cur Adv Vult

Abdul Aziz J: Judging by the submissions on these three originating summonses, there are no factual differences between them that will make a D difference in the decision to be made on each of them. For that reason, I shall, in arriving at my decision on the three applications, consider only the facts and circumstances of case No 249.

As security for banking facilities granted by Bank of Commerce (M) Berhad ('BOC'), the second defendants, to Sheno Paper Industries Sdn Bhd ('Sheno'), named as the plaintiffs, Sheno charged a land of theirs to E BOC under the National Land Code 1965 ('the Code') and also executed a debenture in favour of BOC by which Sheno contractually charged all their assets and undertakings in favour of BOC. The debenture provided that in the event of Sheno's defaulting under the facilities agreement, BOC were empowered, inter alia, to appoint a receiver and manager of Sheno's F assets and undertakings (s 6.02(c)) and that one of the powers of the receiver and manager, who, according to s 6.03, 'shall be (Sheno's) agent', was 'to forthwith sell ... the assets comprised in this security and to carry such sale into effect by conveying or executing the same for or on behalf of (Sheno)' (s 6.03(c)).

Presumably, Sheno defaulted under the facilities agreement, because G BOC eventually appointed a receiver and manager of all of Sheno's assets and undertakings. The receiver and manager, by virtue of his power under s 6.03(c) of the debenture, entered into a sale and purchase agreement to sell the land, which was charged under the Code to BOC, to Pacidunia Sdn Bhd, the first defendants. The agreement was signed by him as signing for H Sheno, described as the vendor. The land not belonging to the receiver and manager but to Sheno, and the debenture providing for the receiver and manager to be the agent of Sheno, it was inevitable that the sale that must have been decided on by the receiver and manager, and the agreement for it, should be one as between Sheno and Pacidunia; and such, therefore, the sale and purchase agreement proclaimed itself to be.

I Clause 3 of the sale and purchase agreement, read with cl 3.1.1, provides that the agreement is conditional on Sheno's obtaining a court declaration that the receiver and manager is empowered to sell the land.

The receiver and manager says in his affidavit dated 13 July 1999, paras 13 and 14, that the reason for the need to obtain such a court declaration is that, in view of the Federal Court decision in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, there is uncertainty as to his power to execute the sale and purchase agreement on behalf of Sheno.

That is the reason for the application in case No 249 (and the other two applications). It is supported by the affidavit of the receiver and manager affirmed in his own right as the receiver and manager of Sheno and not, as would be the case where an ordinary officer or a director of a company affirms an affidavit, with the authority of Sheno. Although cl 3.1.1 of the sale and purchase agreement says that Sheno is to make the application and although the application professes to be Sheno's application, I believe that the will and the decision to make the application were the receiver and manager's, but since, according to the debenture, he is Sheno's agent, the application has to profess to be that of Sheno, the principal. Even learned counsel who claimed to represent Sheno said, in beginning his submission, that the application is by the receiver and manager pursuant to s 183(3) of the Companies Act 1965, which empowers a receiver or manager to apply to the court for directions as to any matter arising in connection with the performance of his functions. I think learned counsel for BOC was right in saying that in a sense this application is that of the receiver and manager. I think it is so in a real sense.

The foremost relief sought in this application is a declaration that the receiver and manager of Sheno is empowered to sell the land on behalf of Sheno. The declaration reflects the stand taken by learned counsel for Sheno or the receiver and manager that the decision in *Kimlin* is not directed at a situation where a receiver and manager sells on behalf of the chargor any land that is charged under the Code.

The attitude of BOC is that they would, as the statutory chargee, consent to the sale if that was the correct position in law but they want to be on the safe side and they would let their counsel argue for a contrary view of the meaning and effect of *Kimlin*. It is an admirable stand for which I am grateful.

I will say straight away that after hearing submissions of learned counsel for the plaintiffs and BOC, I find myself in entire agreement with learned counsel for BOC's understanding of *Kimlin*. I proceed now to state my understanding of *Kimlin* and the reason or reasons why I am unable to accept the meaning and effect of *Kimlin* that learned counsel for the plaintiffs attempted to persuade me to accept.

In *Kimlin*, as security for certain banking facilities granted by a bank to a company, the company charged under the Code certain lands of theirs to the bank and also executed a deed of debenture in favour of the bank, by which they contractually charged their assets and undertakings to the bank. The debenture provided that at any time after the moneys secured by the debenture had become repayable the bank may take possession and control

of the properties charged and may sell them. They may also appoint receivers and managers of the properties charged, who may take possession of them and sell them.

The bank subsequently appointed receivers and managers. The receivers and managers wanted to exercise their power under the debenture to sell the lands charged under the Code, but because there was no express appointment of them as attorneys of the company they thought that they should obtain leave of the court to sell the lands. So an application for leave was made to the High Court. The decision of VC George J is reported in *Bank Bumiputra Malaysia Bhd & Ors v Kimlin Housing Development Sdn Bhd (in receivership)* [1993] 2 MLJ 126. It was an application by the bank and the receivers and managers jointly, with the company as the defendants, in Originating Summons No D3–31–195–88, which number indicates that it was an application made in 1988. At p 128D–E, VC George J said that 'the company has since gone into liquidation'. That event took place on 27 February 1989, according to Edger Joseph Jr FCJ when he delivered the judgment of the Federal Court on appeal. See p 815G–H of [1997] 2 MLJ. So the company went into liquidation after the application to the High Court was filed. The liquidator opposed the application.

In the High Court, it was agreed that the only issue to be decided was whether the receivers and managers had the right and power to sell the lands without resorting to the procedures prescribed by the Code for the sale of lands charged under it. See p 129D. It is not apparent from the judgment how an application for leave to sell under the debenture that was made because the receivers and managers were not expressly appointed as attorneys of the company, and not because the lands were charged under the Code, came to be agreed to be decided on a wider issue that involved the question of resorting to the sale procedure under the Code.

VC George J, who agreed with the decision of Shankar J in *United Malayan Banking Corp Bhd v Official Assignee and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor* [1986] 1 MLJ 75, gave his opinion at p 130A–D. He began by looking at the position where there was a statutory charge but no debenture. He said that in that case the owner-chargor could sell the land with the consent of the chargee. He then considered the position that was before him, where there was the addition of the existence of a debenture which, inter alia, empowered the receivers and managers to sell the lands, and to do so as agents of the company, and he said, 'Since there is the express power to sell, if the registered owner, ie the company, is entitled to sell, the receivers and managers are equally entitled to sell', provided they had the consent of the chargee bank, who, by being the plaintiffs together with the receivers and managers, would of course be consenting. There was no need to obtain a judicial sale. That was the first part of VC George J's judgment and the first point of law that he decided. It was a decision that was based on the conception that it was the company, the owner-chargor, who was selling under the debenture because the receivers and managers, who actually desired the sale, were regarded as acting as agents of the company.

The second part of the judgment followed immediately after the first part and is as follows (p 130E–F):

> Now, that the company has been put into liquidation does not affect a secured creditor and does not affect the securities held by them, not until the secured creditor has been fully paid off.
>
> In my judgment, the secured creditor can dispose of the securities in spite of the liquidation. The receivers and managers are entitled to do what the contract (that the debenture is) entitles them to do. They are not obliged to utilize the land code sale of land procedures.

That was the second point of law. The words 'Now, that the company has been put into liquidation' denote to me that VC George J was then looking at the position with the company being in liquidation, and that, therefore, in the first part of the judgment he was considering the position as under normal circumstances, that is with the company not being in liquidation.

I turn now to the judgment on appeal of the Federal Court. I begin by observing that to the Federal Court the application in the High Court was an application by the receivers and managers — see p 815F, G, H — and that Edgar Joseph Jr FCJ was aware that the receivers and managers, upon their appointment, were agents of the company. See p 824H–I.

The question for decision by the Federal Court was whether VC George J was right in the two points of law that he decided. See pp 816B–D and 817A.

On the first point of law, because the bank contended that the special agreement contained in the debenture conferred on them a conventional power of sale which was independent of the Code, the Federal Court found it necessary to determine, inter alia, whether the scheme of the relevant provisions of the Code shows 'that the legislature was dealing exhaustively and exclusively with the powers of the statutory chargee to defeat the chargor's title as registered proprietor' or, on the contrary, 'that the legislature intended that a chargor can' — by way of a debenture, for example — 'effectively confer upon his chargee a power of sale' that is additional and independent and is exercisable without resort to the machinery for sale provided by the Code. See p 817B–D.

It can be seen that the Federal Court turned their attention from the narrow and mechanical question of agency between a receiver and manager and the landowner, on which alone the decision of the High Court was reached, and gazed higher at the broader, policy question of the intention of the legislature as regards the making of some extra-statutory arrangement between a statutory chargor and a statutory chargee. It is a question that can arise only because, and in the context, of the existence of a statutory charge. The question is, there being a statutory charge in place, is it intended by the legislature that the statutory chargor can nevertheless have a separate arrangement with the statutory chargee — such as by way of a debenture — whereby the statutory chargor confers on the statutory chargee an extra-statutory power of sale by which the chargee can defeat the charger's title? The question was asked to get an answer to set against the contention of the

bank 'that the special arrangement contained in the debenture conferred on the bank a conventional power of sale', which was the power that the receivers and managers sought leave to exercise. The contention indicates that the bank treated the power of sale of the receivers and managers as a power conferred on the bank. It must have been with the same conception that the Federal Court spoke of the statutory chargor conferring a power of sale on the statutory chargee by a debenture or other means. The Federal Court was only looking at two camps, as it were, the chargor camp and the chargee camp. Looking at the question as one between the two camps, if by a debenture a statutory chargor at all confers a power of sale, even one on a receiver and manager, the conferment of power can only be regarded as a conferment on the statutory chargee, because it would not make sense for a statutory chargor to confer a power of sale upon himself, as he would seem to be doing if the view were taken that the power of sale conferred on the receiver and manager by the debenture was a power to be exercised by the receiver and manager as agent for and on behalf of the chargor. Such consideration apart, I think that in a real sense the power of sale in a debenture is conferred on the debenture-holder even though it is said to be conferred on the receiver and manager. That is because the ultimate power to bring about a sale by a receiver and manager, which is to enforce the debenture-holder's interest in the land as a security, lies in the hands of the debenture-holder. The debenture in *Kimlin*, as in the present cases too, also gave power to the bank itself to sell the lands. Instead of exercising that power directly themselves to achieve the sale, they sought to achieve it by appointing receivers and managers, who could carry out the sale. If they did not sell themselves, and they did not appoint receivers and managers, there would be no sale. So the power of sale was in the hands of the bank. I believe that it is in that sense that the Federal Court, in posing the question, spoke of the statutory chargor conferring on the statutory chargee an extra-statutory power of sale.

In considering the scheme of the relevant provisions of the Code, the Federal Court began by saying, at p 818B–C, that if proceedings were brought under the Code to enforce a statutory charge, the chargor would enjoy certain valuable rights not available to a borrower company under a debenture in common form. The examination of some of those rights began at p 818C and ended at p 820B, at which point the Federal Court concluded that those rights, in ss 254 to 265, were designed for the protection of chargors.

The question then arose whether a chargor could waive or contract out of those rights. The fact that the question of contracting out of the statutory rights needed to be considered is another indication that the answer that was ultimately to be given was given in the context of the existence of a statutory charge, because it is only in that context that the question of contracting out could arise. On that question, the Federal Court began by agreeing with *Trietel on Contract*, (at p 782) that if a right is not exclusively personal, but is designed to serve other more broad public purposes, then public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. See p 820G–I. The

Federal Court then proceeded to consider certain authorities, mostly foreign, after which they concluded, at p 823A–C: A

> In our view, therefore, the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. B C

It will be observed that the first sentence of that passage is a general statement of law about 'the provisions of the Code as to the rights of chargors'. They are for the protection of the chargors and cannot be waived or contracted out of. The rest of the passage sets out the consequence of the general statement on the rights of chargors in, specifically, the matter of sale of the charged land. The effective ruling in the entire passage, as it affects the present applications, is that a chargor cannot, by a debenture, confer on the chargee a power of sale outside the Code and that such a power of sale is invalid. The general statement in the first sentence is reinforced by another general statement at p 824D: D E

> In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights — unless expressly provided for in the Code — would be void as being contrary to public policy.

It is a general statement about the rights and remedies under a statutory charge that are contained, not only in ss 254 to 265, but in the whole of Pt XVI of the Code, which includes s 272, the section that lays down the procedure to be observed by a chargee intending to enter into possession of the charged land. (I mention s 272 specifically in recollection of another case that has come before me in which *Kimlin* was raised in connection with the entry into possession of statutorily-charged land by a receiver and manager) . F G

Reading those two general statements together, it is evident to me that according to the Federal Court any attempt to waive or contract out of the statutory rights of a chargor under the Code would be void as being contrary to public policy, and it would appear that to the Federal Court it would be contrary to public policy either because the legislature, by enacting exhaustive and exclusive provisions, did not intend that the rights be waived or contracted out of, or because they are for the protection of the chargor, the Federal Court evidently regarding the matter of protection as not a mere matter of personal benefit but a matter of public policy. H I

The ultimate answer that was given by the Federal Court to the first question on the line of reasoning that I have set out is at p 824F, and the

A answer is that the powers conferred upon the receivers and managers by the debenture did not entitle them to sell the charged lands without taking proceedings under the Code to obtain a judicial sale. It was so because the powers were void. They were void because the provisions conferring them were void. The provisions were void because they amounted to a contracting out by the company of their rights under the Code. By entering B into the contract of debenture with the bank, which empowered the bank to appoint receivers and managers, and which empowered the receivers and managers to sell the charged lands, the Federal Court regarded the company as conferring on the bank the power to sell and therefore as contracting out of their rights under the Code. The contracting out was void C because it was contrary to public policy. It would, therefore, not have made any difference even had it been a case that was viewed as a case of a chargor himself wishing to sell by the agency of the receiver and manager. The sale would not have been allowed because public policy demands that the chargor be protected from his own deed.

The answer to the first question is very clear. Despite the power of sale D conferred on them by the debenture, the receivers and managers were not entitled to sell the lands without taking proceedings under the Code to obtain a judicial sale. The answer has to be applied to the common receiver and manager in the present cases. He is not entitled to sell the lands without taking proceedings under the Code to obtain a judicial sale. He cannot rely E on the power conferred on him by the debentures to do otherwise.

As I said, the first question in *Kimlin* was considered in the context of the existence of a statutory charge. The answer was also given in the same context. *Kimlin* does not go so far as to absolutely render void per se a power of sale, or any other power, conferred by a debenture on a receiver and manager. It does not say that a person can only charge his land under the F Code. Whether it will ever be suggested that such would be the inevitable consequence of *Kimlin* remains to be seen. As its terms stand, however, it operates only on the premise of the existence of a charge under the Code and therefore it may result, as submitted by learned counsel for the receiver and manager here, in a 'slippery' power for a receiver and manager under a debenture, in that if the land affected is not charged under the Code, the G receiver and manager may sell it in reliance on his power, but if afterwards the land is charged, he loses his power, then if later the charge is discharged he regains his power. That may be so, but the decision is clear enough, so there it is.

Upon giving the answer to the first question, the Federal Court H proceeded to consider the second question, namely the effect of the winding up of the company on the receivership, and in particular, on the powers of sale of the receivers and managers. The Federal Court began by saying, at p 824G: 'On a further ground also, the Borrower Company is entitled to succeed'. I have no doubt at all that those words mean that, in considering the first question, the Federal Court, just like VC George J, considered it as I it would be under normal circumstances, that is, as if the company had not been in liquidation. The fact that it was at that point that the Federal Court considered the impact of the winding up on the powers of the receivers and

managers means that, prior to that, it had not been considered. The question was raised 'by way of alternative'. See p 824H. The answer is at pp 826I–827C, and it is that because an officer of a company is required to deliver up to the liquidator all the property of the company in his custody or under his control, and because by virtue of the definition of 'officer' in s 4(1) of the Companies Act 1965 a receiver and manager is an officer of the company, on a winding-up there is, by implication, no longer any estate for the receiver and manager to administer and therefore his agency and his powers are impliedly terminated. The question of a land in the estate being charged under the Code does not at all come within the ambit of the second question, which is a question touching the receivership per se. A consideration of the question of the power of sale simpliciter of the receivers and managers could only have produced the second answer and could not have produced the first answer as well.

Having gone to this length to expound my understanding of *Kimlin*, it becomes an easy matter to dispose of the position taken by learned counsel for the plaintiffs. I have had to go to this length because it is always a difficult task to give reasons for maintaining something that is patently plain and clear against strenuous efforts to argue against it.

The position in law that learned counsel for the plaintiffs argued should be accepted in spite of *Kimlin* is that since a debenture is executed with the authority of the board of the landowner-chargor company, then, if it gives a power of sale to a receiver and manager, it is the company that gives the power to the receiver and manager, and since, by the definition of 'officer' in s 4(1) of the Companies Act 1965, a receiver and manager is also an officer of the company, and therefore an agent of the company, then, so long as he is an agent of the company, that is, so long as he is a receiver and manager, he may sell and the sale is a sale by the chargor company.

That position is virtually the position taken by VC George J in deciding the first question of law. To accept that position would be to ignore the fact that the Federal Court has ruled that the answer given by VC George J to the first question was wrong.

Learned counsel for the plaintiffs, however, argued that the consideration of the Federal Court in *Kimlin* could not have been, and was not, directed to the question or situation of a sale of the lands by the receivers and managers as agents of the chargor company because, the company having gone into liquidation, the receivers and managers were no longer agents of the chargor company. It was argued that the first question was answered with the fact of liquidation in mind. I have already given my opinion that the Federal Court considered the first question without regard to the fact that the company was in liquidation and with full awareness that by virtue of the definition of 'officer' the receivers and managers were officers of the company.

Learned counsel for the plaintiffs referred to the passage, earlier quoted, at p 823A–C of the judgment, where the Federal Court made references to the conferring by the debenture of the power of sale on the 'chargee himself'. He argued from that that the question that the Federal

A Court was concerned with was the question of the power of sale of the chargee, which had nothing to do with the power of sale of the receivers and managers. I have already given my reasons why I think that the Federal Court was indeed thinking of the power of sale of the receivers and managers.

B The conclusive answer to that submission is the fact that the ultimate answer of the Federal Court at p 824F expressly struck at the power conferred on the receivers and managers.

In the said passage at p 823A–C, when saying that no power of sale could be conferred by way of a debenture by a chargor on a chargee, the Federal Court used the emphatic 'himself' in reference to the chargee. Any C suggestion that the emphasis means that a power of sale may therefore be conferred on a receiver and manager will straight away be demolished by the ultimate answer of the Federal Court at p 824F, which is directed to the power of sale conferred by the debenture on the receivers and managers. As to why the word 'himself' was used, I can only suggest, looking at the passage as a whole, that it was to emphasize that the power of sale that was D conferred on the chargee was a power for the chargee to carry out the sale 'in his own way' instead of as a sale conducted under the supervision of the court under the Code.

At p 824C the Federal Court stated that '... the relevant provisions of the Debenture relied upon by the Bank as conferring upon it a power to sell E the lands are void ...'. Those provisions were, or included, provisions that conferred the power of sale on the receivers and managers, and yet the Federal Court said that the bank relied upon them as conferring on the bank a power to sell the lands. That is another indication that the Federal Court regarded the powers conferred on the receivers and managers as amounting to powers conferred on the chargee bank.

F To conclude, I hold that *Kimlin* applies, as it applies in respect of the receivers and managers there, to disentitle the receivers and managers in the present cases to sell the charged lands concerned without taking proceedings under the Code to obtain a judicial sale.

I accordingly dismiss these applications.

G *Application dismissed.*

Reported by Jafisah Jaafar

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